IN THE

Supreme Court of the United States

October Term, 1943

No. 492

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Petitioner;

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR REHEARING

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The judgment of this Court in the above-entitled cause, affirming the judgment below, having been entered on March 27, 1944, the above-named petitioner presents this its petition for a rehearing, and in support thereof respectfully shows:

I.

In reaching its decision this Court was patently influenced by its misunderstanding of facts stipulated and found and set out in the record. The Court overlooked material findings of fact.

As a result of questions by the Chief Justice and answers by the respondent's counsel, in the course of the oral argument before this Court, the impression was created

that the record did not show the amount of funds which were subject to withdrawal by the beneficiaries.

It is apparent from a reading of the opinion that this erroneous impression as to the facts in the record lies at the root of this Court's decision. This is clearly indicated by footnote 3 of the opinion delivered for the Court by Mr. Justice DOUGLAS wherein it is stated:

> "The amount of funds in each of these three categories does not appear, though the petitioner has offered its rough estimates."

As a matter of fact the petitioner offered no "rough estimates" of the funds which the beneficiaries could have withdrawn on demand. The exact percentages stated were expressly stipulated by the parties and found by the Tax Court. The stipulation and the findings show not only the *exact percentages* of the total mean funds held respectively under each of the options elected by the *insured* and under each of the options elected by the *beneficiaries*,[1] *but also the exact amounts of the excess interest dividends paid respectively on funds in each of these categories.*

Paragraph XXXVII-A of the Stipulated Facts (R. 122) embodied in the findings as the last part of paragraph XXXVII (R. 73), states:

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[1] Paragraph XXXI-B of the Stipulated Facts (R. 121) embodied in the findings as the last part of paragraph XXXI (R. 70), states:

> "Of the mean of the 'Present Value of Amounts Not Yet Due on Supplementary Contracts Not Involving Life Contingencies' held by the petitioner at the beginning and end of each of the taxable years, the following percentages were the present values of amounts not yet due under the different options set out in Stipulation Exhibit D exercised as indicated:
>
> | | 1933 |
> |---|---|
> | "Option 1 exercised by insured | 27.52% |
> | " 2 " " " | 15.36% |
> | " 4 " " " | 5.12% |
> | " 1 " " beneficiary | 42.09% |
> | " 2 " " " | 6.76% |
> | " 4 " " " | 2.25% |
> | "Total | 100.00%" |

"The excess interest dividends paid by the petitioner on its Supplementary Contracts Not Involving Life Contingencies, accrued and were paid as follows under the different options set out in Stipulation Exhibit D, exercised as indicated:

	1933
"Option 1 exercised by insured	$147,201.05
" 2 " " "	82,158.73
" 4 " " "	27,386.24
" 1 " " beneficiary	229,930.32
" 2 " " "	36,158.40
" 4 " " "	12,052.80
"Total	$534,887.54"

The Tax Court expressly found that the petitioner had paid *exactly* $229,930.32, of the excess interest dividends for which the deduction is claimed, on funds which had been "left on deposit with the Society at interest" (R. 73, 74). There can be no question of the beneficiaries' absolute right to withdraw these funds on demand (R. 74, 118A). Nor does the respondent dispute the fact, shown by the italicized provision of the contracts (R. 74, 118A), that the beneficiaries had the right to withdraw the funds held by the petitioner under options 2 and 4 *elected by the beneficiaries*. On the funds held under these two options, so elected, the Tax Court *expressly found* that the petitioner had paid excess interest dividends in the following respective *and exact* amounts: $36,158.40 and $12,052.80. Thus the Tax Court expressly found the exact amounts of excess interest dividends paid on funds which were held subject to the beneficiaries' right of withdrawal and which the beneficiaries permitted the petitioner to retain *after* the petitioner's declaration *at the beginning* of 1933 of the specific excess rate at which it would pay interest for that year (R. 72, 112). It is upon *these findings of the Tax*

Court, not upon its own "rough estimates," that petitioner stresses its claim before this Court.[2]

From the opinion delivered herein by Mr. Justice DOUGLAS, it appears that this Court has overlooked the further fact that these so-called excess interest dividends *accrued ratably as time elapsed after the beginning of the year* when the specific excess rate had been declared (R. 72, 74). *This is a distinct characteristic of "interest." Dividends which have been declared on corporate stock do not accrue ratably as time elapses after their declaration.*

II.

As to the entire deduction claimed, the Tax Court's decision is expressly based, not upon failure of proof, but upon an erroneous conclusion that is contrary to its own findings of fact. The decision is "not in accordance with law" as to any part of the deduction at issue.

The Tax Court did not decide this issue against the petitioner because of any lack of evidence. The decision was *expressly* based upon the *erroneous conclusion* that (R. 83):

> "The facts pertaining to this question are substantially the same as the facts involved in *Penn Mutual Life Insurance Co.* v. *Commissioner*, *supra*, under

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[2] It is true that the stipulated facts do not show the proportionate amounts of excess interest dividends respectively paid under contracts entered into *before* and under contracts entered into *after* the *beginning of the year 1933* when the specific rate for that year's excess interest was declared. But, the showing of those proportionate amounts is unnecessary where the options were exercised by the *beneficiaries* for under both the old and the new contracts arising from options so exercised, the beneficiaries at all times could have withdrawn the funds on demand. See the italicized provision of the contracts (R. 74, 118A).

As to that part of the deduction claimed for payments made under options exercised by the insured, the showing of these proportionate amounts *may not be necessary* to sustain the deduction *upon a proper determination* of the issue. See *infra*, p. 6. Even as to this part of the deduction, therefore, the decision below should not be affirmed for failure of proof, a ground not stated by the Tax Court.

> the heading 'As to the "Additional Interest" Awarded to the Policies by the Board of Trustees and Paid Out During the Years 1926 and 1928.'"

This conclusion of the Tax Court is obviously erroneous.

The facts in the *Penn Mutual* case referred to by the Tax Court are those stated in *Penn Mutual Life Insurance Company* v. *Commissioner* (C. C. A. 3, 1937) 92 F. (2d) 962 at pages 969 and 970. As to the payments for which that company was denied a deduction, it is there expressly stated:

> "The addition of 1.85 per cent. is awarded by the trustees *from surplus* * * *." (Italics supplied.)

That statement of fact is amply supported by the Tax Court's findings in that case. The policy provisions under which those payments were made, set out in the Tax Court's findings (quoted in 92 F. [2d] 962 at p. 966) provide:

> "The income under Option A or the income during the instalments-certain period under Option B or C, after the first year, will be increased annually by such *surplus as may be awarded by the Board of Trustees.*" (Italics supplied.)

But in the instant proceeding there is not a single finding of fact that can support the Tax Court's decision that the excess interest dividends here involved constituted "surplus * * * awarded by the Board." On the contrary, the Tax Court's findings in the instant case show that this petitioner's promise to pay excess interest was not conditioned upon the existence of any surplus or profits (R. 70, 72, 74) and the payment of this excess interest therefore cannot be deemed to be "surplus * * * awarded by the Board."

Furthermore the Tax Court's erroneous conclusion that the payment of these excess interest dividends constituted a distribution of surplus is directly contrary to

the express statutory provisions of Section 83 of the New York Insurance Law which was brought to the attention of the Tax Court.[3]

The decision below, not being supported by a single finding of fact, and being contrary to the findings made and to the provisions of a controlling state statute, is "not in accordance with law" and should be reversed. 44 Stat. 110, 26 U. S. C. Sec. 1141(c)(1); *Wilmington Trust Co.* v. *Helvering* (1942) 316 U. S. 164.

III.

The Tax Court's decision should not be affirmed because of failure of proof, a ground not stated by the Tax Court, since the stipulated facts would be ample to sustain a contrary decision *as to all the payments involved*.

As to *no* part of the deduction is the decision below *unquestionably* correct. As to the *entire* deduction that decision was *expressly* based upon the Tax Court's *erroneous conclusion* (R. 83) that the facts here involved "are substantially the same as the facts involved in *Penn Mutual Life Insurance Co.* v. *Commissioner, supra.*"

The Tax Court not having properly determined that any part of the deduction should be disallowed, its decision should not be affirmed on the ground, *not stated by the Tax Court*, that the stipulated facts do not show the proportionate amounts respectively paid under various component groups of contracts. *Upon a proper determination, the showing of these proportionate amounts may not be necessary.*

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[3] This statute which is set out as an appendix to Petitioner's Reply Brief filed with this Court, was brought to the attention of the Tax Court in paragraph 45 of Petitioner's Proposed Findings of Fact and on pages 108, 124 and 125 of the Brief for Petitioner filed with that court.

If the Tax Court had not proceeded upon an erroneous conclusion it might have decided in favor of the petitioner on the entire deduction claimed. The Tax Court did not base its decision upon any failure of proof, and from the opinion of this Court, filed herein, it is clear that the Tax Court had power to make all the ultimate findings necessary to support the entire deduction. From the opinion of this Court it is clear that if the Tax Court had allowed the entire deduction upon the basis of the stipulated facts and of matters of common knowledge, of which that court might have taken judicial notice, that decision in favor of the petitioner would have been sustained by this Court.

As to the excess interest dividends paid to beneficiaries who had power to withdraw their funds, i. e., paid under *options elected by the beneficiaries*; the Tax Court's findings *without further inference* would seem to require the allowance of the deduction (R. 72, 73, 74).

As to the balance of the excess interest dividends paid, i. e., *those paid under options exercised by the insured*, the opinion of this Court shows that the Tax Court could have determined not only, (1) that the petitioner was definitely obligated to make the payments as "interest" under the *new* contracts issued after the specific excess rate had been declared; but also (2) that under the *old* contracts issued in prior years, the petitioner's original promise to pay excess interest dividends, though conditional, was a promise to pay "interest." If the Tax Court had made each of these two determinations, the stipulations and the findings of fact would be sufficient to sustain the deductions, for they show the exact amounts of excess interest dividends paid under each option elected by the insured under the combined *new* and *old* contracts (R. 73, 122).

Prayer.

Wherefore, petitioner prays that this its petition for a rehearing may be granted; and that upon consideration, this Court may vacate its opinion and judgment entered herein on March 27, 1944, and enter a new order correcting the opinion, reversing the decision below, and remanding the case to the Tax Court of the United States with instructions to make whatever further and appropriate findings that court may deem proper and to render a decision not inconsistent with the opinion of this Court and the findings already made; and that this Court may grant such further relief as may appear proper in the premises.

Respectfully submitted,

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OF THE UNITED STATES
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CERTIFICATE OF COUNSEL

The undersigned, counsel for petitioner herein, hereby certifies that the foregoing petition for a rehearing is presented in good faith and not for delay.

JOHN L. GRANT,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 492.—October Term, 1943.

The Equitable Life Assurance Society of the United States, Petitioner, vs. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 27, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

The question in this case is whether petitioner, a mutual life insurance company, was entitled to deduct from its gross income for 1933 "excess interest dividends" paid within that year. The deduction was authorized if the amounts were "interest" paid on "indebtedness"[1] within the meaning of § 203(a)(8) of the Revenue Act of 1932, 47 Stat. 169, 225. The Tax Court denied the deduction. 44 B. T. A. 293. The Circuit Court of Appeals affirmed. 137 F. 2d 623. The case is here on a petition for a writ of certiorari which we granted because the decision below and *Penn Mutual Life Ins. Co.* v. *Commissioner*, 92 F. 2d 962, from the Third Circuit conflicted with *Commissioner* v. *Lafayette Life Ins. Co.*, 67 F. 2d 209, from the Seventh.

The facts are stipulated and show the following: During and prior to 1933 petitioner issued life insurance policies which gave to the insured (and in some cases to the beneficiary) the right to have petitioner hold the face amount of the policies upon their maturity under one or more of several optional modes of settlement in lieu of payment in a lump sum. These optional modes of settlement are exercised under supplementary contracts. Thus one form of supplementary contract provides that the amount of the policy shall be left on deposit with petitioner. And it is provided in case of this, as well as the other types of supplementary

[1] This provision of the Act reads in part as follows: "In the case of a life insurance company the term 'net income' means the gross income less . . . All interest paid or accrued within the taxable year on its indebtedness" with exceptions not relevant here.

contracts which are involved,[2] that "if in any year the Society declares" that funds held under these options shall receive interest in excess of 3% per annum, the payments under them "shall be increased for that year by an Excess Interest Dividend as determined and apportioned by the Society." During the year 1933 some $534,000 of excess interest dividends was paid by petitioner under these supplementary contracts. The amount so paid accrued during the year at the rate which had been declared by petitioner's board of directors at the beginning of that year.

Petitioner's argument runs as follows: Nothing in the supplementary contracts or underlying policies conditions the payment of excess interest dividends on the existence of a surplus. The policies and the statutes authorizing their issuance negative the idea that the payment of these excess interest dividends constitute a distribution of surplus or of earnings of prior years. Petitioner's declaration at the beginning of 1933 that it would pay excess interest dividends in that year at a specific rate constituted an offer. Those who elected in 1933 to keep the funds on deposit rather than to withdraw the amounts of the policies which had become payable during the year, accepted that offer. It is reasonable to assume that but for the declaration at the beginning of the year the new supplementary contracts would not have been made. In at least some of the cases where the funds were already on deposit at the beginning of 1933, the beneficiaries could have withdrawn them on demand. By refusing to exercise that right, and by leaving the funds on deposit, the beneficiaries accepted petitioner's offer. And it is again asserted, but for the declaration of excess interest dividends, it is reasonable to assume that petitioner would not have been permitted to retain and use those funds during that year. As to funds on deposit at the beginning of 1933 and over which the beneficiaries had no power of withdrawal, the argument is that the original promise to pay the excess interest dividends, though conditional, was a promise to pay "interest".[3]

While these are interesting questions which are propounded, the facts on which most of them turn were not determined by the Tax

[2] The other types of optional settlements involved here are instalment options for a fixed period and instalment options in a fixed amount.

[3] The amount of funds in each of these three categories does not appear, though petitioner has offered its rough estimates.

Court. Its findings of fact did not go beyond the stipulation. And it apparently was not asked to go farther. It based its ruling on *Penn Mutual Life Ins. Co.* v. *Commissioner, supra*. It may be that custom or a course of dealing or other circumstances would warrant findings of fact which would support at least part of the claimed deduction. But more proof is needed than the provisions of the policies and the contents of the stipulation. It is not our task to draw inferences from facts or to supplement stipulated facts. That function rests with the Tax Court. We may modify or reverse the decision of the Tax Court only if it is "not in accordance with law". 44 Stat. 110, 26 U. S. C. §1141 (c) (1); *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164; *Dobson* v. *Commissioner*, 320 U. S. 489. We must make our determination on the record before us. If relevant evidence was offered before the Tax Court but rejected by it, we could remand the case to it for appropriate findings. But no such situation is presented here. Accordingly we can reverse the judgment below only if we can say on the basis of the provisions of policies and the meager stipulation that the excess interest dividends were "interest" within the meaning of the Act[4] as a matter of law.

The "usual import" of the word interest is "the amount which one has contracted to pay for the use of borrowed money." *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Deputy* v. *Dupont*, 308 U. S. 488, 498. We cannot say as a matter of law that the excess interest dividends fall within that category. They appear to be amounts which may be declared or withheld at the pleasure of the board of directors. An obligation to pay may of course arise after the declaration the same as in case of dividends on stock. But an obligation to pay declared dividends on stock would hardly qualify as "interest" within the meaning of the Act. The analogy of course is not perfect, as these excess interest dividends may not be payable from surplus or earnings of prior years and the obligation to pay the principal amount under each option was absolute. Yet payments made wholly at the dis-

[4] Sec. 163 (a) of the Revenue Act of 1942, 56 Stat. 798, 868, includes within the definition of "interest paid" the following: "All amounts in the nature of interest, whether or not guaranteed, paid within the taxable year on insurance or annuity contracts (or contracts arising out of insurance or annuity contracts) which do not involve, at the time of payment, life, health, or accident contingencies." The Senate Report points out that this provision was designed to include both guaranteed interest and excess interest dividends. S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 146-147.

cretion of the company have a degree of contingency which the notion of "interest" ordinarily lacks. If we expanded the meaning of the term to include these excess interest dividends, we would indeed relax the strict rule of construction which has obtained in case of deductions under the various Revenue Acts. *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440; *Deputy* v. *Dupont*, *supra*, p. 493. Appropriate findings of fact might well bring such payments within the meaning of "interest", as for example a finding that their declaration was the basis on which new contractual engagements were made. But such is not this case.

Affirmed.